Douglas S. Kantor
202 429 3775
dkantor@steptoe.com

1330 Connecticut Avenue, NW
Washington, DC 20036-1795
202 429 3000 main
www.steptoe.com

January 28, 2019

Via Electronic Filing – www.regulations.gov

Roxanne Rothschild
Associate Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

RE: The Standard for Determining Joint-Employer Status (NLRB-2018-0001; RIN 3142-AA13)

Dear Ms. Rothschild:

Our clients, the National Association of Convenience Stores ("NACS") and the Society of Independent Gasoline Marketers of America ("SIGMA")(collectively "the Associations") write to comment on the National Labor Relations Board's ("NLRB" or "Board") Proposed Rule, "The Standard for Determining Joint-Employer Status."[1]

NACS and SIGMA believe that the NLRB's 2015 ruling in *Browning-Ferris*[2] was far too expansive and support returning to a joint employer standard guided by the tenets of *direct* and *immediate* control over essential terms and conditions of employment. As such, the Associations support the Proposed Rule, which returns the joint employer standard to its traditional framework: finding a joint employment relationship exists only when an employer has actually exercised control over essential terms and conditions of employment. Returning to this standard will be particularly helpful to franchisees and franchisors because the nature of the franchise relationship often triggers joint employment questions. In this way, the standard will ensure that employees are best protected by the employers they actually work for.

Additional comments on the Proposed Rule can be found below.

[1] National Labor Relations Board, Proposed Rule, *The Standard for Determining Joint-Employer Status*, 83 Fed. Reg. 46681, September 14, 2018, retrieved from GPO at https://www.gpo.gov/fdsys/pkg/FR-2018-09-14/pdf/2018-19930.pdf [hereinafter *Proposed Rule*].

[2] 362 N.L.R.B. No. 186, slip op. (Aug. 27, 2015).

I. BACKGROUND

A. The Associations' Members Are Significant Entry-Level Employers

The fuel wholesaling and convenience industry is a significant entry-level employer. The industry employed approximately 2.5 million workers in 2017.[3] On average, for example, retail outlets employ about 15 associates per store. Employee turnover is a cost to businesses that retailers are constantly seeking to minimize through pay, benefits, and/or advancement opportunities. In fact, 15 percent of adult Americans have worked at a retail motor fuel outlet or convenience store at some point in their working lives. It is important to note that because our industry tends to promote from within, we are a significant entry-level employer for management jobs. The fuel wholesaling and convenience industry is a significant percent of the U.S. economy: in 2017, it generated $601.1 billion in total sales, representing approximately 3.1 percent of U.S. Gross Domestic Product.

NACS is an international trade association representing the convenience store industry with more than 2,500 retail and 1,600 supplier companies as members, the majority of whom are based in the United States. SIGMA represents a diverse membership of approximately 260 independent chain retailers and marketers of motor fuel. Collectively, NACS and SIGMA represent approximately 80 percent of retail motor fuel sales in the United States.

B. Nearly All Retail Gasoline Outlets Are Owned and Operated by Small Businesses That Operate On Narrow Margins

Fuel retailers serve more than 165 million people per day—around half of the U.S. population—and the industry processes over 60 billion payment transactions per year. And despite the fact that one in every 32 dollars spent in the American economy is spent in this channel of trade, it is an industry of small businesses. The vast majority of branded outlets are locally owned, approximately 63 percent of convenience store owners operate a single store, and approximately 80 percent of NACS' membership is composed of companies that operate ten stores or fewer. The fuel wholesaling and convenience store industry is one of the most competitive in the United States—the Associations' members are unable to absorb even incremental cost increases resulting from regulatory burdens without passing them on to consumers.

C. Franchising is Very Common in the Fuel Retailing Business, Although There Are Many Different Types of Franchise Models

Within the convenience store industry, there are many distinct business models.[4] One type is the typical franchise model (e.g., 7-Eleven franchisees), where a franchisee operates one

[3] All of the data points about the convenience store industry come from the NACS, State of the Industry: Annual Report (2017).

[4] There are at least 16 models for convenience and fuel retailing stores that involve different versions of the fuel models and in-store models described below: (1) company owned, company operated sites; (2) company owned, dealer operated sites; (3) dealer owned, dealer operated site; (4) commission agent site; (5) company merchandize

or more locations pursuant to a contract that allows it to use the name of a larger franchisor. In some of those instances, the franchisor has established parameters on food offerings, business plans, or other aspects of the functioning of the location, but in other situations, it has not. Indeed, convenience stores and fuel retailers vary greatly—even those that are part of the same chain—based largely on their location. For example, stores within a chain may sell the same items, but the way the stores offer those items frequently differs. Catering to individual preferences is a defining trait of the industry.

The fuel retailing and convenience industry is also known for using another type of business arrangement, which is little known or understood outside the retail fuels space, and is governed by its own legal regime (i.e. The Petroleum Marketing Practices Act).[5] Specifically, fuel retailers may be branded with the name of a major oil company or a private brand. In some instances, under such a branding contract, a store contractually agrees to the sale of motor fuels under the brand name (e.g., Exxon, Shell, Tesoro, Chevron, etc.). That brand, however, may have nothing to do with in-store service offerings and other sales. When people talk about a branded ExxonMobil retailer, for example, the brand may be unrelated to the food store operated next to the fuel pumps. Of course, there are also arrangements in which the store is also branded with the name of the major oil company and is subject to its brand standards. Those brand standards typically cover things like cleanliness and hours but often do not go into specifics on in-store product offerings. Thus, the branded retailer model is frequently very different from the traditional restaurant franchisee model because the branded fuel retailer may operate his convenience store like an independent business without direction by the brand on the offering of other goods.

II. COMMENTS ON THE PROPOSED RULE

Whether or not a business is considered a joint employer with respect to a specific employee is particularly important because it results in significant responsibilities under the law. Yet, there has been considerable confusion regarding what constitutes a joint employer relationship since the Board's 2015 ruling that an employer could be considered a joint employer if they had the potential to determine essential terms and conditions of employment, regardless of how such businesses actually acted in practice.[6] This is of particular concern to the retail fuel and convenience store industry as many of these businesses operate under the franchisee-franchisor or similar business models, which tend to raise joint employer questions. Thus, the Associations welcome the clarity that will be restored by returning to the pre-2015 standard and the further details the Board is proposing in its rule. Comments on the standard itself and the clarifying examples can be found below.

---

and company foodservice, (6) company merchandise and franchise foodservice; (7) franchise merchandise and franchise foodservice; (8) rented out location, etc.

[5] *See generally* 15 U.S.C. § 2801 et seq.

[6] See *supra* note 2.

A. The Associations Support the Proposed Rule

NACS and SIGMA support the Proposed Rule's statement that "an employer may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. More specifically, to be deemed a joint employer under the proposed regulation, an employer must possess and actually exercise substantial direct and immediate control over the essential terms and conditions of employment of another employer's employees in a manner that is not limited and routine."[7] This standard provides much-needed clarity and keeps the franchisor-franchisee relationship within the bounds that existed when many chose to enter into such a relationship. The requirement that control is actually exercised is essential to remain consistent with how the law developed in this area over decades.

The 2015 *Browning-Ferris* ruling, in contrast, inserted significant uncertainty into this determination. Under that standard, an employer could be considered a joint employer if they had the potential to determine essential terms and conditions of employment, regardless of how such businesses actually acted in practice. *Browning-Ferris* so dramatically increased the scope of the standard that even the most limited opportunities for control on the part of an employer could lead to a finding of joint employment. Unsurprisingly, the D.C. Circuit recently reversed the NLRB's approach with respect to indirect control for being inconsistent with "common-law limitations," while also noting that the Board had provided "no blueprint for what counts as "indirect" control."[8] Such a broad and unspecific standard creates compliance difficulties for businesses, as it becomes difficult to determine when they may be covered under the standard and when they may not. Compliance becomes exponentially more difficult when one is talking about a small business, which generally does not have the money or resources—legal or otherwise—to determine how best to proceed in complying with the standard. Thus any standard should be as clear and precise as possible to facilitate compliance by businesses of all sizes.

Overall, the Proposed Rule takes significant steps towards clarifying the joint employer standard and ensuring that the law protects employees that are truly jointly employed by more than one employer. The Associations, however, urge the Board to address issues with the proposed examples so that the examples are fully reflective of the proposed standard and assist businesses in determining when a joint employer relationship exists.

B. The Associations Urge the Board to Further Refine the Proposed Examples

In the Proposed Rule, the Board suggests amending 29 C.F.R. part 103 to include a definition of a joint employer and various supporting examples. While the Associations support the proposed definition, they have concerns about specific examples the Board then proposes to include regarding how to interpret the standard.

---

[7] See *supra* note 1 at 46681.

[8] *Browning-Ferris Industries of Cal., Inc. v. NLRB*, No. 16-1028 (D.C. Cir. Dec. 28, 2018)("The Board's analysis of the factual record in this case failed to differentiate between those aspects of indirect control relevant to status as an employer, and those quotidian aspects of common-law third-party contract relationships.").

1. Some Examples Properly Encapsulate Joint Employment As Seen in the Fuel Retailing and Convenience Industry

Some of the proposed examples are particularly useful for describing how to consider the joint employer standard.

i. Example 5

In particular, Example 5 provides excellent context:

> **Example 5 to § 103.40.** Under the terms of a franchise agreement, Franchisor requires Franchisee to operate Franchisee's store between the hours of 6:00 a.m. and 11:00 p.m. Franchisor does not participate in individual scheduling assignments or preclude Franchisee from selecting shift durations. Franchisor has not exercised direct and immediate control over essential terms and conditions of employment of Franchisee's employees.[9]

Example 5 demonstrates that while a franchisor may set certain brand standards, such as hours of operation, this does not mean the franchisor is exercising control over specific terms of employment. Franchisors in the retail fuel and convenience industry may have certain overall requirements that they set for brand standards. However, the franchisee-retailer can often exercise a certain amount of individual control, as in Example 5, with regard to the scheduling of shifts inside the general parameters set by the franchisor. As such, setting general performance standards does not necessarily constitute a joint employment relationship. Rather, such general performance parameters are often part of the "limited and routine" elements of a franchise relationship.

ii. Example 9

Proposed Example 9 also details important distinctions in applying the joint employer standard:

> **Example 9 to § 103.40.** Manufacturing Company contracts with Independent Trucking Company ("ITC") to haul products from its assembly plants to distribution facilities. Manufacturing Company is the only customer of ITC. Unionized drivers— who are employees of ITC—seek increased wages during collective bargaining with ITC. In response, ITC asserts that it is unable to increase drivers' wages based on its current contract with Manufacturing Company. Manufacturing Company refuses ITC's request to increase its contract payments. Manufacturing Company has not exercised direct and immediate control over the drivers' terms and conditions of employment.[10]

This example is particularly relevant in the fuel retailing context because many retailers contract with "jobbers,"[11] truckers, and other suppliers to deliver food, fuel, and other goods to

[9] See *supra* note 1 at 46697.

[10] *Id.*

[11] A jobber is an individual or company that purchases motor fuels from refining companies and sells and often delivers that product to retailers.

the stores. This contractual relationship between two employers alone, however, should not constitute a joint employment relationship, as the above example clearly shows. Here, two companies have a contract for the provision of certain services, but the Manufacturing Company is in no way exercising control over the employees of the ITC. Thus, no joint employment relationship exists.

2. Other Examples Do Not Properly Apply the Standard and Create Confusion

While certain examples in the Proposed Rule show the joint employer standard being properly applied, the following examples are problematic. Many of these examples are problematic because they find a joint employment relationship even though the "sharing or codetermining" of certain terms or conditions is limited or routine.

i. Example 2

For instance, Example 2, which deals with wages, fails to take into account valid wage law-related reasons that one employer might stipulate a wage rate in a contract. The example states:

> **Example 2 to § 103.40.** Company A supplies labor to Company B. The business contract between Company A and Company B establishes the wage rate that Company A must pay to its employees, leaving A without discretion to depart from the contractual rate. Company B has possessed and exercised direct and immediate control over the employees' wage rates.[12]

While this example may be appropriate for legitimate contract provisions set by a franchisor or contracting company regarding wage rates, it lacks necessary nuance and a recognition of similar arrangements that should not constitute joint employment arrangements. It would be helpful if the Board expanded on this example – or included an additional example – that makes clear that a contractual provision calling for wages to conform to prevailing market rates or a "living" wage would not trigger a joint employer relationship. This is particularly relevant in the case of a franchisor-franchisee business relationship where the franchise may span multiple state lines and the franchisor chooses to set a contractual wage floor based on the highest minimum wage in the states across which the franchise operates. When a contract establishes a wage rate, floor, or ceiling to ensure that businesses are in compliance with state or local wage laws (e.g. a state minimum wage requirement) in light of the multi-state operation of the business or franchise, this should not constitute direct or immediate control (and thus a joint employer relationship). Complying with applicable labor laws or otherwise seeking to ensure that wages meet certain minimum standards is not the same as setting specific wage controls in an employment relationship.

ii. Example 6

Another problematic example is Example 6, which states:

[12] See *supra* note 1 at 46697.

> **Example 6 to § 103.40**. Under the terms of a franchise agreement, Franchisor and Franchisee agree to the particular health insurance plan and 401(k) plan that the Franchisee must make available to its workers. Franchisor has exercised direct and immediate control over essential employment terms and conditions of Franchisee's employees.[13]

This example is inconsistent with the standard set in the Proposed Rule and actually disincentivizes robust benefits packages being offered to employees. In this example, the franchisor wants to ensure that the franchisee offers some minimum benefit to the franchisee's employees (a health insurance and 401(k) plan). These are benefits the worker could opt out of. Here, a worker who does not like the retirement benefits offered by the employer is free to utilize other savings vehicles, such as an individual retirement account. Likewise, a worker who does not wish to make use of the health insurance option offered through a workplace has the option to enroll in a marketplace plan under the Affordable Care Act. Yet, regardless of whether the employee or the franchisee could opt out of the benefit, this should not trigger a joint employment relationship under the standard. Franchisors helping establish benefit plans that can be used by franchisees is a good practice because it provides franchisees the ability to offer quality healthcare and retirement plans to employees that they otherwise might not be able to offer.

The Board should consider the impact of such an example on employee welfare. If the NLRB wants to encourage employers to offer better and more robust benefits for employees, it will not succeed if it defines the very offering of a minimum benefit as evidence of a joint employer relationship.[14] In the franchisor-franchisee context, the franchisor is in a much stronger position to negotiate better benefits packages on behalf of all its franchisees (which the franchisees can then offer their employees) than a single franchisee. And, if the franchisor is concerned that its brand not be associated with offering poor or meager worker benefits, it stands to reason, then, that the franchisor would make a minimum benefit option a required offering for its franchisees.

iii. Example 11

Example 11 raises concerns because it concludes that proper communication between a company and its contractor engenders a joint employment relationship. Per the example:

> **Example 11 to § 103.40.** Business contract between Company and Contractor reserves a right to Company to discipline the Contractor's employees for misconduct or poor performance. The business contract also permits either party to terminate the business contract at any time without cause. Company has never directly disciplined Contractor's employees. However, Company has with some frequency informed Contractor that particular employees have engaged in misconduct or performed poorly while suggesting that a prudent employer would certainly discipline those employees and remarking upon

[13] *Id.*

[14] For example, if a franchisor chooses a specific health insurance provider or retirement plan that provides affordable costs and/or high-quality care to plan participants, then it remains unclear what harm an employee would come to in being offered the opportunity to enroll in such a plan.

its rights under the business contract. The record indicates that, but for Company's input, Contractor would not have imposed discipline or would have imposed lesser discipline. Company has exercised direct and immediate control over Contractor's employees' essential terms and conditions.[15]

This example would require much more factual information in order to arrive at a conclusion that a joint employment relationship exists. It is entirely appropriate that a company would inform a contractor that some of its employees are engaging in misconduct or performing work poorly. Without such an exchange of information, a contractor would not know that there is a problem. That may lead to further employee misconduct, legal or business problems, and/or the ultimate termination of the contact. Here, the company is putting the contractor on notice of a problem and allowing the contractor to properly discipline its employees (i.e., it is not usurping the employer's disciplinary role). Such a scenario should not create a joint employer relationship. The company engaged in a limited communication about employee performance with its contractor and essentially informed the contractor that it needed to do its job and monitor and discipline its employees.

3. While the Associations Agree That Example 12 Correctly Finds That a Joint Employer Relationship Does Not Exist, Further Clarification of This Example Would Be Helpful

Example 12 in the Board's Proposed Rule properly finds that no joint employer relationship exists when a Company immediately bars a Contractor's employee from its premises for serious misconduct (i.e., sexual harassment). Example 12 states:

> **Example 12 to § 103.40**. Business contract between Company and Contractor reserves a right to Company to discipline Contractor's employees for misconduct or poor performance. User has not exercised this authority with the following exception. Contractor's employee engages in serious misconduct on Company's property, committing severe sexual harassment of a coworker. Company informs Contractor that offending employee will no longer be permitted on its premises. Company has not exercised direct and immediate control over offending employee's terms and conditions of employment in a manner that is not limited and routine.

The principles at play in Example 12 should apply to serious misconduct of *any kind*; it should not be exclusive to sexual harassment. A company should have a right to say it does not tolerate misconduct, no matter what it is (e.g., drug use, etc.) by immediately barring an individual from its premises without triggering a joint employer relationship.

4. The Associations Urge the Board to Add an Additional Example Relating to Performance Standards in the Franchise Context

While the Associations are cognizant that the examples provided in the Proposed Rule are "illustrative and not setting the outer parameters of the joint-employer doctrine," it would be

[15] See *supra* note 1 at 46697.

helpful if the Board added an additional example relating to performance standards in the franchise context. Specifically, the NLRB should add an example clarifying that a franchisor setting basic performance standards for a franchisee does not constitute a joint employer relationship. It is common practice for a franchisor to set basic standards that: (1) ensure facilities are clean and presentable; (2) require basic professional conduct; and (3) ensure that the franchisees comply with applicable laws and regulations (e.g. wage laws). Such requirements ensure that business is conducted in such a way that does not lead to legal or reputational trouble. This type of relationship is *routine* in the franchise space and it should be clarified that this is acceptable under the joint employer standard. How a franchisee chooses to meet these standards is the franchisee's business and as such, the setting of such standards in and of itself should not constitute joint employment.

III. CONCLUSION

Thank you for the opportunity to provide these comments. NACS and SIGMA commend the Board for seeking to return the joint employer standard to a clearer, fairer definition. The Associations stand ready to assist the Board as it moves forward.

Respectfully,

Douglas S. Kantor
Counsel to NACS and SIGMA